

ORIGINAL

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:
PUBLIC BROADCASTING RATE PROCEEDINGS :
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1111-20th Street N.W.
Room 450
Washington, D. C.

Tuesday, June 6, 1978

The hearing in the above-entitled matter commenced
at 4:20 p.m.

BEFORE:

COMMISSIONER THOMAS C. BRENNAN, Chairman
COMMISSIONER DOUGLAS E. COULTER
COMMISSIONER MARY LOU BURG
COMMISSIONER CLARENCE L. JAMES, JR.
COMMISSIONER FRANCES GARCIA

PRESENT:

BERNARD KORMAN
I. FRED KOENIGSBERG
BENJAMIN ZELENKO

Counsel for ASCAP

ERIC SMITH
ALLEN LATMAN

Counsel for PBS

ALSO PRESENT:

Eugene N. Alienikoff, PBS

* * *

RECORDED VOTES

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P R O C E E D I N G S

1
2 CHAIRMAN BRENNAN: The meeting will come to order.
3 All the parties with a personal interest in this subject
4 matter were personally notified of this meeting. Because of
5 the requirements of the Copyright Act, it was not possible to
6 give other public notice.

7 We enter a new phase of the proceeding this after-
8 noon, the consideration and adoption of the final rule, in-
9 cluding the schedule of rates and terms.

10 A draft of the final rule has been circulated to the
11 Commissioners, and I direct that it be made a portion of the
12 record at this point.

13 If there is no objection, the text will be made
14 pending business for purposes of amendment.

15 I will now recognize Commissioners for the purpose
16 of offering amendments to the final rule, or for purposes of
17 debate. It may facilitate the procedure if we were to consider
18 amendments in the order in which the sections appear in the
19 final rule.

20 Are there any amendments to Section One and Two?

21 (No response.)

22 CHAIRMAN BRENNAN: If not, we've reached Section
23 Three, which is concerned with the performance of ASCAP
24 musical compositions.

25 It became apparent in recent days that there is no

1 formula that commands general support in this body, whether
2 it be based on ratings, revenue, use of music or population.

3 More importantly, each of those formulas, despite
4 the best efforts of their sponsors, suffer from inherent
5 limitations.

6 Consequently, at the meeting yesterday, some of
7 the commissioners were confronted with several options. One
8 option was to pursue the course followed by Commissioner
9 Burg to propose that we abandon the efforts to device a
10 workable formula, and instead, adopt a flat payment based
11 upon the record in this proceeding.

12 I decided to explore another option, the utiliza-
13 tion of Commissioner Garcia's revenue formula, and the deter-
14 mination of the initial payment to be made by Public Broad-
15 casting to ASCAP, which amount would then remain in force
16 for the term of this schedule, other than for the 1981 in-
17 flation adjustment.

18 When it became apparent that this enterprise was
19 not serving its intended purpose, I withdrew the motion,
20 although I subsequently voted for the motion when it was
21 offered by Commissioner Coulter.

22 Commissioner Coulter's amendment has, in my
23 opinion, effectively dealt with some of the problems inherent
24 in the utilization of a revenue formula. At the very least,
25 it reduces the frequency and number of disputes.

1 But, on reflection, I have determined that the
2 opportunities for unproductive disputes will persist under
3 this formula.

4 Consequently, I have decided that Commissioner
5 Garcia's revenue formula should in no way be employed in
6 determining the amount of the payment, nor should any specific
7 or single formula be utilized in that determination.

8 Rather, we should, in my judgment, adopt a flat
9 payment which will be developed generally on the basis of two
10 criteria -- one, the general record made in this proceeding
11 as to the determination of the reasonable value of the
12 performance of ASCAP music by Public Broadcasting, and as a
13 benchmark or indication of what would be a reasonable payment
14 to consider the collective totals reached by the various
15 proposals -- population, revenue, various variations thereof
16 -- that were advanced during these proceedings, but in no way,
17 and in no respect, to link the final payment to a specific
18 formula.

19 Among other virtues, I believe this will further
20 reduce the possibilities for disputes.

21 I, therefore, propose an amendment to Section 304-3,
22 which would strike the sum currently appearing in the draft
23 final rule, and insert in lieu thereof, the sum \$1,250,000.

24 The amendment is the pending business. Is there
25 any debate on the amendment?

1 COMMISSIONER GARCIA: Mr. Chairman?

2 CHAIRMAN BRENNAN: Commissioner Garcia.

3 COMMISSIONER GARCIA: The revenue proposal sub-
4 mitted to you yesterday for your consideration was, in my
5 judgment, a sound business approach method. It is regretful
6 that this Tribunal chose to ignore that and go instead with
7 a flat fee.

8 The final result was certainly not what my pro-
9 posal to this Tribunal was advocated. My real purpose in
10 speaking to you here today is that those people most affected
11 by this decision are the artists of America.

12 Both parties -- ASCAP and Public Broadcasting --
13 are non-profit organizations. ASCAP has testified that 80
14 percent on every dollar is returned to their members.

15 I contend that my proposal was a simple one, cer-
16 tainly as a business approach conveying music, for this is a
17 difficult situation.

18 Arguments have been made that it is too much money.
19 I disagree that my formula would have skyrocketed the fees
20 outside, because the formula rates were set so low. We were
21 talking about three-tenths of one cent for public television
22 and four-tenths of one cent for radio for each dollar.

23 Again, too much money for whom? Certainly, it
24 would have been too much money for me to pay. The Tribunal
25 has been given an opportunity to pioneer in a field which

1 is new in this country.

2 It is true that all the commissioners have approach-
3 ed the subject in good faith, and have taken their responsi-
4 bilities very seriously. Of course, the results cannot
5 satisfy all the commissioners and all parties equally. How-
6 ever, hopefully, what we have done here yesterday, and are
7 about to do today, will be without prejudice and precedence.

8 In five years, when both parties have an oppor-
9 tunity to get used to the idea of paying this money, I hope
10 that this Tribunal will seek the opportunity to strike a
11 proper balance.

12 And while I cannot support the pending motion as
13 being a fair and equitable rate, and giving to the member-
14 ship of ASCAP their fair value, I hope that in 1982 this
15 Tribunal will adopt a simple revenue method.

16 CHAIRMAN BRENNAN: Thank you, Commissioner.

17 Any further debate on the amendment?

18 (No response.)

19 CHAIRMAN BRENNAN: If not, we will proceed --
20 Commissioner Burg?

21 COMMISSIONER BURG: I, for a long time in these
22 proceedings, have been on the record, both publicly and in
23 informal discussions in the office, that I opposed any form
24 of a revenue base to this rate schedule.

25 My colleagues have been aware of this. I think

1 everybody here in this room has been aware of it. It has
2 been an article of faith with me. It is not directed towards
3 the members, either individually or collectively, of ASCAP.
4 I have nothing against the authors and composers as people.
5 I do not want to penalize them.

6 But part of my resistance to the entire concept of
7 revenue was that it did, indeed, inflate the final figure.

8 I must say that if the roles of the two participat-
9 ing parties in these proceedings were reversed, in terms of
10 dollar amounts, in terms of what they were asking for and
11 what they offered, I would feel exactly the same way.

12 I initially proposed a market population concept,
13 which would yielded somewhere in the neighborhood of
14 one million to one point one million. I was happy with this
15 figure. I was satisfied with it. I felt for the initial
16 five-year period it was fair to both ASCAP and to Public
17 Broadcasting.

18 Yesterday, I voted and accepted a figure of 1.224
19 million dollars. I swallowed hard then. I find I'm
20 swallowing a little harder today because that figure has just
21 moved up to 1.250, I believe it was.

22 I will buy that figure, and I will vote for it,
23 reluctantly. Thank you.

24 CHAIRMAN BRENNAN: Thank you, Commissioner. Any
25 further debate on the amendment?

1 COMMISSIONER JAMES: I'd like to say something, Mr.
2 Chairman.

3 CHAIRMAN BRENNAN: Commissioner James.

4 COMMISSIONER JAMES: I'm concerned, as I've ex-
5 pressed here before, that we are not, really, by the adoption
6 of this rate, fulfilling the mandate the Congress has turned
7 over to us.

8 Our mandate, and throughout the testimony of all
9 the witnesses, and my concept of the examination, I thought
10 it was to come up with a fair and reasonable rate and value
11 for what the artists are entitled to.

12 The only benchmark, I think, that was offered into
13 evidence under which we could logically come up with any
14 type of rate was the one offered on the formula based on what
15 the commercial rate was.

16 Over the years, almost 34 years, commercial broad-
17 casters have been paying for the use of musical repertoires
18 from the various performing rights societies.

19 I think the evidence was overwhelmingly presented--
20 and certainly not to my satisfaction contradicted -- that if
21 a tune has a certain value in the commercial market, then
22 that is the market value, whether it's used by a commercial
23 station or a non-profit station.

24 I'm also mindful of the mandate in the reports by
25 both the House and the Senate that any rate that we took into

1 consideration would not be done with the eyes of attempting
2 or the guise of attempting to subsidize public broadcasting.

3 I think the record reflects that there is little
4 supportive justification for a flat fee that has no basis,
5 has no relevancy to value, because it's a value that is not
6 predicated upon anything.

7 And the only benchmark, as Commissioner Garcia
8 indicated in her remarks earlier, that is logically supported
9 by this record, is the one that was offered by ASCAP, which
10 is predicated upon the commercial value.

11 So that to take a position that a flat rate -- and
12 I can equate the difference. We are not talking about a
13 voluntary agreement where a flat rate was negotiated; we are
14 talking about a rate that we have to promulgate and sustain
15 as being and giving fair value -- we're not fulfilling the
16 mandate that was given to us by Congress.

17 CHAIRMAN BRENNAN: Any further debate on the
18 amendment?

19 (No response.)

20 CHAIRMAN BRENNAN: If not, we will vote on the
21 amendment.

22 The amendment is to strike the sum which currently
23 appears in 304.3, and insert in lieu thereof the sum
24 \$1,250,000.

25 We shall have a recorded vote.

1 Commissioner Coulter?

2 COMMISSIONER COULTER: Yes.

3 CHAIRMAN BRENNAN: Commissioner Burg?

4 COMMISSIONER BURG: Yes.

5 CHAIRMAN BRENNAN: Commissioner James?

6 COMMISSIONER JAMES: No.

7 CHAIRMAN BRENNAN: Commissioner Garcia?

8 COMMISSIONER GARCIA: No.

9 CHAIRMAN BRENNAN: The Chair votes aye.

10 The "ayes" are three; the "nays" are two. The
11 amendment is adopted.

12 The rule is open to further amendments. Are there
13 further amendments? Commissioner Coulter?

14 COMMISSIONER COULTER: I'd like to make the amend-
15 ment that the -- that this sum be subject to inflation
16 adjustment annually.

17 CHAIRMAN BRENNAN: May I inquire of the Commissioner
18 if he is intending to limit the yearly adjustment to the
19 ASCAP formula, or would that apply to all the fixed sums?

20 COMMISSIONER COULTER: In this instance I was re-
21 ferring only to the ASCAP formula, and I'd like to restrict
22 it to that.

23 CHAIRMAN BRENNAN: If another commissioner wishes
24 to expand the amendment, we can do that either by amendment
25 to your amendment or by separate motion.

1 COMMISSIONER COULTER: Can we just handle this one?

2 CHAIRMAN BRENNAN: The pending amendment is an
3 amendment to extend only the ASCAP fee on a yearly cost-of-
4 living adjustment.

5 Is there debate on the amendment?

6 COMMISSIONER JAMES: I think it is discriminatory.

7 CHAIRMAN BRENNAN: Perhaps the Commissioner might
8 wish to offer an amendment to the amendment.

9 COMMISSIONER JAMES: The reason I say I think it is
10 discriminatory, I think if you -- there is -- well, let me
11 ask the Commissioner first. Is he amending 304.11, or is he
12 amending this current rule here? What is his motion addressed
13 to?

14 COMMISSIONER COULTER: My intention was to amend
15 the current rule here. If 304.11 is concerned --

16 COMMISSIONER JAMES: Well, 304 is an inflationary
17 rate that deals with certain --

18 COMMISSIONER COULTER: I know. I know.

19 COMMISSIONER JAMES: And what you're doing is
20 giving preferential --

21 COMMISSIONER COULTER: I see what you mean.

22 I'm amending 304.3, and if we intend to amend
23 304.11, I'd like to do that separately.

24 CHAIRMAN BRENNAN: The Commissioner has that right.
25 The pending amendment is to 304.3. You've heard the

1 Commissioner's amendment. Is there any discussion on the
2 amendment?

3 (No response.)

4 CHAIRMAN BRENNAN: If not, we will proceed to a
5 vote on the amendment, which is, in essence, to have a yearly
6 cost-of-living adjustment for the PBS payment to ASCAP.

7 Commissioner Coulter?

8 COMMISSIONER COULTER: Yes.

9 CHAIRMAN BRENNAN: Commissioner Burg.

10 COMMISSIONER BURG: Yes.

11 CHAIRMAN BRENNAN: Commissioner James?

12 COMMISSIONER JAMES: No.

13 CHAIRMAN BRENNAN: Commissioner Garcia?

14 COMMISSIONER GARCIA: Yes.

15 CHAIRMAN BRENNAN: The Chair votes yes.

16 The "yeas" are four; the "nays" one. The amend-
17 ment is adopted.

18 Are there further amendments?

19 COMMISSIONER GARCIA: Mr. Chairman?

20 CHAIRMAN BRENNAN: Commissioner Garcia.

21 COMMISSIONER GARCIA: We're moving on to Section
22 304; is that correct?

23 CHAIRMAN BRENNAN: Yes, if you want to.

24 COMMISSIONER GARCIA: Section 304.11, cost-of-
25 living. I think Commissioner James had a good observation,

1 the fact that we may be discriminating if we only allow to
2 one party and not the others. Therefore, I'm making an
3 amendment that this be on a yearly basis, and strike out
4 "November 1, 1980" and make it yearly, to be effective
5 January 1st of each year.

6 CHAIRMAN BRENNAN: Would Commissioner Coulter feel
7 that there would be a need for his separate amendment if we
8 have a provision in 304.11?

9 COMMISSIONER COULTER: No.

10 CHAIRMAN BRENNAN: Then, would you include in your
11 motion, Commissioner Garcia, that your --

12 COMMISSIONER GARCIA: Yes, Mr. --

13 CHAIRMAN BRENNAN: -- would delete the Coulter
14 amendment from 304.3. -

15 COMMISSIONER JAMES: Then I'll withdraw my "no"
16 vote, Mr. Chairman, because that was my concern.

17 CHAIRMAN BRENNAN: The Chair so understood.

18 COMMISSIONER GARCIA: Mr. Chairman, I move that
19 Section 304.11, Cost-Of-Living, be amended to reflect cost-
20 of-living yearly for all parties dealing with the Public
21 Broadcasting entity, which would incorporate Commissioner
22 Coulter's prior amendment to the ASCAP flat fee.

23 CHAIRMAN BRENNAN: You heard the amendment. Is
24 there any debate on the amendment?

25 (No response.)

1 CHAIRMAN BRENNAN: If not -- Commissioner Burg?

2 COMMISSIONER BURG: I feel compelled to at least
3 explain. I, in principle, do not like the idea of institu-
4 tionalizing inflation, and I think by yearly increase we do
5 this. However, so that my position would not be misconstrued,
6 I went along with the yearly increase.

7 I will do so again in this instance, but I would
8 like the record to reflect that I am not entirely happy with
9 it.

10 CHAIRMAN BRENNAN: Any further debate?

11 (No response.)

12 CHAIRMAN BRENNAN: If not, we will vote on
13 Commissioner Garcia's amendment.

14 Commissioner Coulter?

15 COMMISSIONER COULTER: Yes.

16 CHAIRMAN BRENNAN: Commissioner Burg?

17 COMMISSIONER BURG: Yes.

18 CHAIRMAN BRENNAN: Commissioner James?

19 COMMISSIONER JAMES: Yes.

20 CHAIRMAN BRENNAN: Commissioner Garcia?

21 COMMISSIONER GARCIA: Yes.

22 CHAIRMAN BRENNAN: The Chair votes yes.

23 There are five "yeas;" no "nays." The amendment
24 is adopted.

25 The rule is open to further amendments. Are there

1 further amendments?

2 COMMISSIONER GARCIA: I have none, Mr. Chairman.

3 CHAIRMAN BRENNAN: If not, the Chair would like to
4 go through the table of contents and the general subject
5 matter of the final rule.

6 We will invite counsel to attempt to follow, as
7 best they can, and at the end of the recitation, if there are
8 issues which counsel feel have not been addressed that should
9 be included, we'll be glad to hear such statements.

10 Section One is devoted to the general scope of the
11 final rule. We have previously made clear that our final
12 rule is not a license agreement, and that the rights granted
13 to public broadcasting are those set forth in 17 U. S. C.
14 118(d).

15 Consequently, the section devoted to scope consists
16 merely of a reference to the rights and activities set forth
17 in the statute.

18 Section Two is the definition of a public broad-
19 casting entity, which conforms to the definition in the
20 Copyright Act.

21 Section Three is concerned with ASCAP musical
22 compositions. As I indicated in my question to Mr. Latman
23 yesterday, the heading of this and similar sections reads,
24 "The performance of ASCAP musical compositions by PBS and
25 its stations, and NPR and its stations."

1 There are several subsections of Part Three, all of
2 which have been discussed extensively.

3 Section Four is concerned with the performance of
4 musical compositions in the repertory of the Italian Book
5 Corporation.

6 The final rule provides, as in the case of ASCAP,
7 for a flat payment under a blanket license.

8 The Commissioners have determined that under the
9 statute we cannot discriminate in such matters as record-
10 keeping by public broadcasting entities, or the rights of
11 copyright owners, however small they might be.

12 On the other hand, we feel that we certainly have
13 discretion to be guided by test of reason, and there is
14 nothing in this record to suggest that we ought to impose
15 a requirement that the Italian Book Corporation receive
16 separate accounts of standard cue sheets.

17 However, to comply with the requirement of the
18 statute as we see them, we do provide that if PBS or NPR is
19 requested by the Italian Book Corporation to examine such
20 cue sheets which those stations otherwise are required to
21 maintain, that such right of access shall be granted to the
22 representatives of the Italian Book Corporation.

23 And in Section Five we have a similar provision
24 with respect to the totally unaffiliated copyright owners.

25 As was previously determined, this body believes

1 that we have a responsibility to establish a schedule of
2 rates and terms for all copyright owners, whether or not their
3 existence is currently known to this body.

4 As to the fee schedule for the unaffiliated, we
5 followed, as we feel we would have to, a per-performance
6 schedule, which is similar to the rates suggested in the
7 PBS presentation.

8 COMMISSIONER BURG: There is a question.

9 CHAIRMAN BRENNAN: Yes?

10 MR. ALEINIKOFF: May I just ask, Mr. Chairman,
11 if you have a blanket license fee for the Italian Book
12 Corporation?

13 CHAIRMAN BRENNAN: Yes. Yes. A lump sum. And
14 since it's no secret, the amount is \$600.

15 304.6, Performance of Musical Compositions by
16 Public Broadcasting Entities Licensed to Colleges or Univer-
17 sities.

18 Subsection A is concerned with the scope of Section
19 Six, and indicates that it applies to non-commercial stations
20 which are not affiliated with NPR.

21 PBS in their presentation -- in a footnote, I
22 believe -- made reference to some highschoools or other
23 educational institutions having broadcasting licenses.

24 And although we have, throughout this proceeding,
25 spoke of colleges and universities, if there are any such

1 highschool institutions, they likewise are covered by this
2 provision.

3 The rate schedule for the colleges was discussed
4 yesterday, and I need not cover that ground again.

5 As with the PBS and the NPR stations, we believe
6 that there is an obligation to supply copyright owners with
7 music use reports, but we provide that ASCAP, BMI and SESAC
8 each shall not in any one calendar year request more than
9 10 stations to furnish a report for one week of each calendar
10 year.

11 Section Seven is devoted to the performance of
12 musical compositions by other public broadcasting entities,
13 which means the unaffiliated stations. The rates were dis-
14 cussed yesterday. The recordkeeping provisions are similar
15 to those for the colleges.

16 And in both the college and the unaffiliated
17 sections, we have the language concerning the protection of
18 the voluntary license agreements that was previously dis-
19 cussed.

20 Section Eight establishes rates and terms for the
21 recording of non-dramatic performances and displays of
22 musical works on and for the radio and television programs
23 of public broadcasting entities, whether or not synchroniza-
24 tion or time relationship, with visual or oral content, and
25 for the making, reproduction and distribution of copies and

1 phono-records of public broadcasting programs, containing
2 such recorded non-dramatic performances and displays of
3 musical works solely for the transmission by public broad-
4 casting entities as defined in the statute.

5 The rates and terms established in this schedule
6 include the making of the reproduction described in 17 U.S.C.
7 118(d)3, which is the seven-day provision.

8 This is followed by the royalty schedule. As to
9 this, a determination had to be made as to whether the rates
10 for recordings by national programs of PBS should be re-
11 duced, since under our schedule, payments are also required
12 for recordings by local and regional stations.

13 We have determined not to reduce the rates for the
14 recordings by PBS for national programs.

15 The schedule of fees covers broadcast use for a
16 period of three years, following the first broadcast. We
17 have language as to additional payments, which is similar
18 to the language in the Harry Fox Agreement.

19 And because this particular schedule expires on
20 December 31, 1982, we provide that uses which are subsequent
21 to that date shall be subject to the rates established in
22 this schedule.

23 As was previously indicated, the Commissioners
24 have basically accepted the arguments made by music publishers
25 and other copyright owners that they are entitled to receive

1 reports of the use of their musical compositions for local
2 and regional programs, as well as for national programs.

3 We defined the content of the standard cue sheets,
4 which is similar to the language in the voluntary agreements.

5 The rule accepts the recommendation that cue sheets
6 shall be deposited with the Copyright Royalty Tribunal.

7 Section Nine deals with the terms and rates of
8 royalty payments for pictorial, graphic, and sculptural
9 works. The rates and terms established in this schedule in-
10 clude the making of the reproduction described in 17 U.S.C.
11 118(d)3.

12 Since the royalty schedule has not been discussed
13 recently, I will read the schedule for such uses in a PBS-
14 distributed program.

15 "For a feature display of a work, \$30. For back-
16 ground and montage display, \$15. For use of a work for
17 program identification, or for thematic use, \$60.

18 "For the display of an art reproduction, copy-
19 righted separately" -- and, of course, this is the trans-
20 parancy problem -- "\$20."

21 Then, there is a lower schedule for uses in other
22 than PBS programs, and certain of these terms are then
23 defined.

24 This is followed by the provisions as to the use
25 reports. And, again, the filing of use reports with the

1 CRT. On these issues, as this Commissioner previously indi-
2 cated, he has doubts as to the productive value of certain of
3 this reporting, and I will come to another provision on that
4 subject in a few minutes.

5 As was previously resolved with regard to the
6 visual works, the rates of the schedule are for unlimited
7 broadcast use for a period of three years from the date of
8 the first broadcast.

9 Section 10 is concerned with the unknown copy-
10 right owners, and requires PBS, NPR, and their stations, to
11 retain the required fee in a segregated trust account for a
12 period of three years from the date of the required payment.

13 No claim is valid after the expiration of the
14 three-year period, and public broadcasting entities may
15 establish a joint trust fund for such purposes.

16 Concern was expressed by commissioners that there
17 could be an incentive on the part of public broadcasting
18 not to locate copyright owners, and the section provides
19 that the public broadcasting entities shall make information
20 concerning the fees deposited in the trust fund available to
21 this body, upon the request of this body.

22 Section 11 is the cost-of-living adjustment, which
23 was recently amended to provide for a yearly cost-of-living
24 adjustment, based on the Consumer Price Index, the U. S.
25 City Average or items, Irving Consumer Index.

1 Section 12 is concerned with notice of restrictions
2 on use of reproductions of transmission programs. The report
3 of the House Committee invites this body to adopt regulations
4 on that subject, and in substance the provision provides that
5 any public broadcasting entity, which, pursuant to 118,
6 supplies a reproduction of a transmission program, shall in-
7 clude with each copy a warning notice stating that the re-
8 productions may be used for a period of no more than seven
9 days from the specified date of the transmission, and that
10 the reproductions must be destroyed by the user at the end of
11 that period.

12 Section 13 is concerned with the amendment of cer-
13 tain regulations of the CRT, and provides that subject to the
14 Copyright Act, the APA and our rules of procedure, the CRT
15 at anytime may amend, modify, or repeal regulations which
16 were adopted, by which copyright owners may receive reasonable
17 notice of the use of their works, and under which records
18 of such use shall be kept by public broadcasting entities.

19 Section 14 concerns the issuance of interpretative
20 regulations. And, again, with the same restrictions, pro-
21 vide that the CRT may at any time, either on its own motion,
22 or the motion of a person having a significant interest in
23 the subject matter issue such interpretative regulations as
24 may be necessary or useful to the implementation of this
25 part.

1 It is further provided that such regulations may not
2 alter the schedule of rates and terms of royalty payments
3 established by this part.

4 Finally, Section 15 concerns the report to the
5 Congress on the implementation of Section 118.

6 (A discussion was held off the record.)

7 CHAIRMAN BRENNAN: Does any party wish to suggest
8 additional subjects that can easily be included in the rule?
9 Mr. Korman?

10 MR. KORMAN: Mr. Chairman, I would like to inquire
11 whether consideration was given to reflecting the possible
12 change which can result from addition of new stations,
13 either through construction, during the term of this
14 agreement, or stations which are not now represented by NPR,
15 possibly because of the standards that NPR has for eligi-
16 bility, which relates to the minimum budget and minimum
17 number of paid staff, and so forth. I believe that's all
18 in the record. Either because of changes in those minimum
19 requirements, or whatever reason, we may find literally
20 hundreds of radio stations which, under the schedule that you
21 have just described, would be required to pay separate
22 fees merely by joining NPR. Unless there is some adjustment
23 factor provided, there would be significant, or possibly
24 significant loss of fees to ASCAP's members.

25 I raise the question whether consideration was

1 given to that question or those questions.

2 CHAIRMAN BRENNAN: No, it was not, because until
3 yesterday, we were thinking primarily in terms of various
4 formulas which would have dealt with the particular problem
5 that you have just indicated.

6 Have you a proposal to make at this time?

7 MR. KORMAN: I do, Mr. Chairman.

8 Of course, the problem would not exist under the
9 proposal of Commissioner Garcia. It occurs to me that
10 perhaps the way of dealing with it is for this very limited
11 purpose to use the percentage which would seem satisfactory
12 to a majority of the members of the Tribunal yesterday so
13 that there could be an add-on for new stations.

14 I would suggest that it be based on three percent
15 in the case of television, and four percent in the case of
16 radio of the first year's budget.

17 COMMISSIONER JAMES: That would be added on to the
18 flat base?

19 MR. KORMAN: Yes, Commissioner.

20 COMMISSIONER JAMES: I so move, Mr. Chairman.

21 COMMISSIONER BURG: First year budget of what?
22 That particular station in question?

23 MR. KORMAN: Yes. I don't believe we're talking
24 about large sums of money, obviously. But there would other-
25 wise be a loop hole.

1 CHAIRMAN BRENNAN: Mr. Korman, have you drafted
2 any language on this particular subject?

3 MR. KORMAN: I have not, Mr. Chairman. If I could
4 see the rule, I would be happy to put my hand in Fred's
5 brains.

6 CHAIRMAN BRENNAN: No, I was just inquiring whether
7 you had done so. Thank you.

8 COMMISSIONER JAMES: Why don't we take a five-
9 minute recess.

10 MR. KORMAN: One other --

11 CHAIRMAN BRENNAN: We can adopt it in principle
12 and then --

13 Commissioner Burg, I think, has one question for
14 Public Broadcasting.

15 COMMISSIONER BURG: Well, just, in connection with
16 this, what number of stations are we talking about? Can you
17 give us any information on that, now?

18 MR. LATMAN: Could we have just a minute or two?
19 I don't know if you want to recess.

20 CHAIRMAN BRENNAN: Yes, we've been going for an
21 hour or so. We'll take a five-minute recess.

22 MR. LATMAN: Thank you.

23 (A short recess was taken.)
24
25

1 CHAIRMAN BRENNAN: Does Public Broadcasting desire
2 to be heard before a Commissioner is recognized to offer an
3 amendment?

4 MR. ALIENIKOFF: We'd like to be heard if it is
5 convenient for you to hear us right now.

6 CHAIRMAN BRENNAN: As always.

7 MR. ALIENIKOFF: I think initially I would like
8 to say just one or two words about the whole approach of
9 additional stations or for that matter reduction in the
10 number of stations.

11 It does seem to us that there are questions in
12 both ways and I think you will notice in the licenses, the
13 voluntary licenses, where this idea comes from that, there
14 is provision for either reduction or addition in number of
15 stations.

16 We're not sure what will happen in the future
17 any more than Mr. Korman is about what stations will belong.

18 Let me review just once more. Right now PBS has
19 as its membership, virtually 100 percent of the stations in
20 this country. There are very few additional stations'
21 licenses outstanding to be picked up and activitated. There
22 may be some some place, but we certainly don't know of any
23 great expectations for this in numbers.

24 Our understanding of what the Commission has done
25 today, the Tribunal has done today, was to take a flat figure.
Just again, contrary to what's in the voluntary agreement
where this kind of an adjustment is made, there is no upward
or downward adjustment for cost of living. And, actually, in

1 our negotiations the adjustment for numbers of stations was
2 in substitution in our mind for that kind of a cost of living
3 increase, so that we thought we had taken care of it by that
4 time.

5 In this case, it seems to me we are getting a
6 double kind of increase or decrease formula.

7 As far as radio is concerned, we recognize that
8 there are some 600 stations or, as we have said, small or
9 some of them larger, according to colleges that may choose
10 at some point to come over and become members of NPR.

11 It is our feeling that you have set fees for those
12 stations. The fact that they become NPR members is no dif-
13 ferent from when they were non-NPR members and therefore the
14 easiest way to make that adjustment where there is a substantial
15 number of stations, and it might be unfair to keep the same
16 kind of licenses fee, would be to add that number of what
17 had been paid to ASCAP, since some of those fees are for all
18 music use provided and proportionate to the NPR or the PBS
19 fees.

20 As I remember the charge for the larger stations
21 was \$1000 and that the ASCAP percentage was 45 percent. That
22 would make \$450 as a flat fee.

23 On television, really, I think that we feel that
24 this is such a small amount of stations, if there are any,
25 that whatever figure you come up with has to be arbitrary.
Yes, you can divide some numbers which takes into account the
television fee rather than the radio fee by a number of
stations. I would only point out we have always had some

1 conflict in the number of licensees and the number of
2 stations. There are difficulties in doing that.

3 I guess that the best way to do it, if you really
4 feel it is worthwhile, even though it amounts to such a small
5 amount of money, and it really isn't worth this attention,
6 is to take an artificial figure. If you just do it in rough,
7 you can get the 3,000 or you can get to something like that
8 as an annual fee by dividing something by something, but that's
9 about where we may come out.

10 As far as other licensees are concerned, I want
11 to now get to the Italian Book Company.

12 CHAIRMAN BRENNAN: Let's come back to that.
13 Commissioner?

14 COMMISSIONER JAMES: Mr. Chairman, I move that
15 we amend or add to actually to Section 304.3, two new
16 sections; Section C -- Subsection C, which would read -- and
17 we'll clean up the language later -- "In the event that in the
18 future an unaffiliated radio station or a new station becomes
19 a member of NPR the basic rate described in Section A shall
20 be increased by the amount ASCAP would have received from
21 said station under 304.6 and 304.7."

22 CHAIRMAN BRENNAN: Commissioners have heard --

23 COMMISSIONER JAMES: Want me to give them to you
24 one at a time?

25 CHAIRMAN BRENNAN: Yes. Let's dispose of radio
and then we'll come to television.

Commissioners have heard the amendment. Any
discussion on the amendment?

1 (No verbal response.)

2 CHAIRMAN BRENNAN: All those in favor will say
3 "aye".

4 (A chorus of "ayes".)

5 CHAIRMAN BRENNAN: Opposed, nay. The ayes have
6 it. The amendment is adopted.

7 Commissioner James?

8 COMMISSIONER JAMES: Adding further to Section
9 304.3, a new Subsection D, that "In the event a new television
10 station becomes a member of the Public Broadcasting Service
11 System, that at that time the matter will be brought before
12 the Tribunal for a determination at that time of the royalty
13 rates that will be paid and added to the basic formula as
14 defined in Subsection A of this section."

15 CHAIRMAN BRENNAN: Commissioners have heard the
16 amendment on this amendment. The Chair would welcome any
17 comments that Public Broadcasting or ASCAP might care to
18 make.

19 MR. ALIENIKOFF: May I make a statement?

20 CHAIRMAN BRENNAN: Mr. Alienikoff.

21 MR. ALIENIKOFF: Again, just to repeat, Commis-
22 sioner James, this is such a minor kind of a happening, in
23 our view, of what could happen, of whether it is one station
24 or two stations, that the whole concept comes back to the
25 Tribunal for additional consideration of what the possibilities
would be. It seems to us it would just be an exercise that
might not be worth it to ASCAP or to ourselves or to the
Tribunal.

1 I think we would prefer to see some sort of
2 arrangements like what you have said for radio rather than to
3 go through that kind of a procedure.

4 CHAIRMAN BRENNAN: Mr. Korman, do you wish to be
5 heard in this?

6 MR. KORMAN: Mr. Chairman, I think there may be
7 a problem with the statute as to whether you can now include
8 in your rates and terms something --

9 CHAIRMAN BRENNAN: Would you want an analogy with
10 the inflation adjustment?

11 MR. KORMAN: No, because this is a rate of term
12 now being adopted and you are providing for a specific kind
13 of adjustment.

14 CHAIRMAN BRENNAN: Yes, but we are providing now
15 that in the event certain thing occurs, that there shall be
16 a proceeding before this body.

17 MR. KORMAN: Mr. Chairman, I would not raise the
18 question. I will say that on behalf of ASCAP. I do think --
19 and we would welcome an opportunity to come back here short
20 of five years with the public broadcasters, but I do think
21 that there probably is an easier way to do it. What Mr.
22 Smith had suggested and what I had agreed on, that whatever
23 the Tribunal's pleasure is on this item, ASCAP will accede
24 to.

25 COMMISSIONER BURG: Can't we devise an artificial
figure to break --

COMMISSIONER JAMES: That's what he's doing right
now. I'll withdraw my motion, Mr. Chairman.

1 CHAIRMAN BRENNAN: Commissioner James has withdrawn
2 his amendment on television.

3 COMMISSIONER GARCIA: Commissioner James?

4 COMMISSIONER JAMES: Yes.

5 COMMISSIONER GARCIA: On your previous motion,
6 did you have a rate there per year, or for one period?

7 COMMISSIONER JAMES: It would be added to the
8 basic requirements.

9 COMMISSIONER GARCIA: I'm talking about rates of
10 radio and TV, I mean for unaffiliated stations.

11 COMMISSIONER JAMES: It would be added to the basic
12 rates. If somebody joins tomorrow, just add it to the formula
13 over --

14 COMMISSIONER GARCIA: Okay.

15 CHAIRMAN BRENNAN: Commissioner Coulter, do you
16 wish to offer --

17 COMMISSIONER COULTER: May I just broach the
18 concept initially? This is taking into account both Mr.
19 Smith's -- what I perceive was his initial proposal and Mr.
20 Alienikoff's desire for simplicity and that's respecting the
21 fact that there were radio funds in the figure that we
22 cited or established earlier, and then simply assign some
23 flat figure to the addition of any television station. I
24 would like to offer that as a possibility just to make
25 things simple.

26 COMMISSIONER GARCIA: How many television stations
27 are there; six?

28 MR. SMITH: Right now?

1 COMMISSIONER GARCIA: No; members.

2 MR. SMITH: The number of non-commercial educational
3 television I believe is 276, but I could be off. I don't
4 have it in my memory.

5 MR. ALIENIKOFF: Mr. Chairman, I have one further
6 point. I hope that whatever regulation you provide would be
7 both for a reduction in membership as well as an increase in
8 membership. That is what we have had in the past and it is
9 a perfectly possible thing to happen.

10 CHAIRMAN BRENNAN: Have you any language you wish
11 to suggest?

12 MR. ALIENIKOFF: Whatever the language that you
13 were going to use and make it applicable to any increase
14 or diminution or however you want to put it.

15 CHAIRMAN BRENNAN: How would you ascertain on the
16 same share?

17 MR. ALIENIKOFF: I'm talking about radio as well
18 as television both ways. We would prefer obviously not to do
19 anything with this to be simple about it, but if we're going
20 to go into anything, it would be fairer, we believe to have --

21 CHAIRMAN BRENNAN: Commissioner James, do you
22 accept that as being part of your amendment on radio --

23 COMMISSIONER JAMES: I think that's fair.

24 CHAIRMAN BRENNAN: Would the Commissioner then
25 include that in whatever language he supplies the Chair?

COMMISSIONER JAMES: All right.

COMMISSIONER COULTER: I would like to move that
the sum per added station to the PBS network be \$4,000 and

1 obviously if there is a decrease in stations, then subtract
2 the \$4,000.

3 CHAIRMAN BRENNAN: Commissioners have heard the
4 amendment. Any discussion?

5 (No verbal response.)

6 CHAIRMAN BRENNAN: All those in favor say, "aye".

7 (A chorus of ayes.)

8 CHAIRMAN BRENNAN: Opposed?

9 (No verbal response.)

10 CHAIRMAN BRENNAN: The ayes have it. The amendment
11 has been adopted.

12 Mr. Alienikoff invites our attention once again
13 to one of our favorite subjects, the Italian Book Corporation
14 and he raises a question which we have joked about in the
15 office, but it is a serious issue and it is the question
16 supposed that the Public Broadcasting System and NPR make
17 no use or little use of copyrighted compositions from that
18 repertoire, are they required to pay the \$600 fee.

19 Mr. Alienikoff, would you care to suggest what
20 you would like in the way of a solution?

21 MR. ALIENIKOFF: Yes. We would like to suggest
22 that music controlled by the Italian Book Company or by any
23 other publisher that is not affiliated with ASCAP, BMI or
24 SESAC come within the confines of your section on per use.

25 CHAIRMAN BRENNAN: As the record will indicate,
gone back and forth on the Italian Book Company, and I will
move that the section on the Italian Book Company be deleted
from the final rule --

1 COMMISSIONER JAMES: That's 304.4.

2 CHAIRMAN BRENNAN: 304.4; which will have the
3 result that Mr. Alienikoff desires.

4 Any debate on the amendment?

5 (No verbal response.)

6 CHAIRMAN BRENNAN: All those in favor please
7 indicate.

8 (A chorus of ayes.)

9 CHAIRMAN BRENNAN: Opposed?

10 (No verbal response.)

11 CHAIRMAN BRENNAN: The ayes have it.

12 Now, Mr. Alienikoff has another interesting
13 question for us to discuss this late in the day, namely the
14 effective date of the regulations. This body has been pro-
15 ceeding as has most other people on the premise that the
16 final rules will become effective upon the date of publication
17 in the Federal Register, which if we comply with the statute,
18 should be June 8. But, whether it's June 8, June 9, or June
19 10, the issue is is that the effective date of this rule.

20 Mr. Alienikoff, I will be glad to hear your
21 argument on this issue.

22 MR. ALIENIKOFF: I'm afraid that this is a legal
23 matter and one of our lawyers can answer that.

24 CHAIRMAN BRENNAN: Mr. Latman.

25 MR. LATMAN: Section 809 of the Copyright Law
is entitled: Effective Date of Final Determinations, and it
appears to say quite clearly -- well, I won't say what it
appears to say. I will read it, if I may.

1 "Any final determination by the Tribunal under
2 this chapter shall become effective 30 days following its
3 publication in the Federal Register as provided in Section 803
4 B." Then there is a clause that follows that says: "Unless
5 certain things would happen before then."

6 803 B simply states: "Every final determination
7 of the Tribunal shall be published in the Federal Register"
8 and then proceeds to describe what the determinations shall
9 include.

10 So, it would seem quite clear from the words of
11 the statute that the determinations will become effective
12 30 days after publication in the Federal Register.

13 CHAIRMAN BRENNAN: It is quite clear, Mr. Latman,
14 that you are selective in the words that you read from the
15 statute. Would you, as I'm sure you were anticipating, now
16 address yourself to Section 118 and analyze that language
17 for us?

18 MR. LATMAN: 118 D(3) states: "Within six months,
19 but not earlier than 120 days from the date of publication
20 of notice specified in this subsection, the Copyright Royalty
21 Tribunal shall make a determination and publish in the Federal
22 Register a schedule of rates and terms which subject to
23 clause two of this subsection , that's the voluntary provision,
24 shall be binding on all owners of copyright and works specified
25 by this subsection and public broadcasting entities regardless
of whether or not such copyright owners and public broadcasting
entities have submitted proposals to the Tribunal."

It was my reading of that that that doesn't state

1 when it shall become effective. It states what shall be
2 effective and on whom.

3 The other provision that I read, I thought
4 addressed itself to the question of when such determination
5 shall be effective.

6 COMMISSIONER JAMES: How do you interpret: "Shall
7 be binding."

8 MR. LATMAN: I think the real thrust of it --
9 first of all, "shall be binding" certainly is true. It
10 shall be binding within the timetable of the entire statute.
11 I think the thrust of that, as I would read it, was that
12 regardless of whether or not they appeared. I think that's
13 the thrust of why it was put in that way, but I don't think
14 there is any question that it shall be binding, except the
15 question of when shall it become effective.

16 CHAIRMAN BRENNAN: I was diverted, Mr. Latman.
17 Would you address yourself to Subclause 4, the sentence
18 reading: "With respect to the period beginning on the
19 effective date of this title and ending on the date of
20 publication of such rates and terms."

21 Now, if we were to accept your argument, is it
22 not reasonable that the Congress, at this point, would
23 have said: "And, ending on the effective date of such rates
24 and terms" if they intended the effective date to be a
25 different date from the date of publication?

26 MR. LATMAN: You certainly could argue that.
27 Again, I think the thrust, and you, of course, Mr. Chairman,
28 are more familiar with this than I --

1 CHAIRMAN BRENNAN: No, I think your colleagues
2 at the table are much more familiar with Section 118 than I
3 am.

4 MR. LATMAN: It is really again addressing itself
5 to the freezing of rights until publication.

6 CHAIRMAN BRENNAN: If we accept your argument,
7 the Congress has provided this ridiculous result that you have
8 the benefit of the status quo until the rates are published
9 in the Federal Register, but for the 28 or 29 days between
10 the publication and the effective date, the special protection
11 that the Congress felt you were entitled to no longer exists.

12 Isn't that a necessary conclusion from your
13 analysis?

14 MR. LATMAN: It may be. You mean we take our
15 chances during the 29 days?

16 CHAIRMAN BRENNAN: I'm not suggesting that the
17 Congress intended that. It would seem that would have to
18 be the conclusion that would be reached.

19 MR. LATMAN: I would suspect that again, this
20 clause was focusing on the freezing provision whereas the
21 Title VIII, the Chapter 8 provisions, were focusing on the
22 kind of questions that are now before the Tribunal; the nuts
23 and bolts of Tribunal action and what the Tribunal does, and
24 when its action becomes effective.

25 I would agree with you that the Clause 4 that
you read seems a little inconsistent with that. I would
think that the provision using that old concept that the
provision that addresses itself specifically to a question

1 should govern and Section 809 does just that.

2 CHAIRMAN BRENNAN: I would make just the reverse
3 argument that it's Section 118 which provides an entire
4 schedule for this proceeding, starting with when the initial
5 notice must be published, indicating the period in which we
6 must conduct the proceeding, when the proceeding must be
7 concluded and now to argue that when it gets to the effective
8 date you ignore the language in Section 118 and look else-
9 where, I cannot accept.

10 MR. LATMAN: Mr. Chairman, I certainly understand
11 that, I don't think you should ignore it. But, there are
12 a lot of other provisions of Chapter VIII which have been
13 operative right throughout, such as membership for the
14 Tribunal, procedures of the Tribunal. In other words, you
15 have integrated those into Section 118 as you proceeded.

16 Now when the time comes for a determination, I
17 would suggest that you integrate the time determination
18 provision in 809 into 118 also.

19 CHAIRMAN BRENNAN: Other than for giving Public
20 Broadcasting three or four weeks without having to pay under
21 this schedule, what practical advantages would flow from this
22 interpretation? Mr. Smith?

23 MR. SMITH: There is a provision, and I'm not
24 suggesting this is going to happen. I think the structure
25 of it is that before the 30 days expires, there isn't the
opportunity for any party to this proceeding, or people
who are not parties presumably, to appeal. If the rate is
effective -- the anomaly would result that if you appeal and

1 the rate is affected back, that there might be -- and since
2 the court can vacate at that point, there would be a three-
3 week period of liability followed by a vacation of the rate,
4 it would get just equally as confusing there, I would think.

5 CHAIRMAN BRENNAN: Your request, or your inter-
6 pretation is not motivated by desire to allow an opportunity
7 for a comment on the final rule. It's just the concern that
8 you just enumerated?

9 MR. SMITH: We have not discussed, and it is
10 certainly not motivated by a determination to comment.

11 MR. ALIENIKOFF: Mr. Chairman, may we ask what
12 was in the Tribunal's mind about that? We have not been
13 uncertain about what the Tribunal's procedures are bound to
14 be.

15 CHAIRMAN BRENNAN: As to the question of publishing
16 the rule for comment?

17 MR. ALIENIKOFF: Yes.

18 CHAIRMAN BRENNAN: In the normal situation I
19 would certainly favor that course of action. I suspect
20 most, if not all of my colleagues would, but if we accept
21 our interpretation of 118, that we're required to complete
22 this proceeding within six months, it would appear that it
23 would be ignoring the intent of Congress for us to further
24 extend this proceeding.

25 I would personally welcome that possibility, but
I think it's been precluded by the statute.

Mr. Korman?

MR. KORMAN: We support what you have said, and

1 my counsel, Mr. Koenigsburg, calls attention to 804 C. It
2 seems to be a specific provision in Chapter VIII which Mr.
3 Latman was looking for, and which says: "With respect to
4 proceedings under 801 D (1), concerning the determination
5 of reasonable terms and rates of royalty payments as provided
6 in Section 118, the Tribunal shall proceed when and as
7 provided by that section", which I think is further support
8 for the Chairman's view.

8 MR. LATMAN: That, of course, is the timetable.
9 That's 1982 and your six-month provision. I think there is
10 no question the title is: Institution and Conclusion of
11 Proceeding.

12 MR. ALIENIKOFF: That's 804 A and B.

13 MR. KORMAN: No, no, no, no, no. That's not what
14 it says.

15 MR. LATMAN: In other words, the timetable of
16 what the Tribunal does, I think, is spelled out clearly in
17 118. The question of when it becomes effective I think is
18 covered by 809.

19 MR. KORMAN: 801 also, and it refers again to
20 801 B, the Section D(1), to Section 118 as the guiding
21 light for the Tribunal and as to the effective date.

22 CHAIRMAN BRENNAN: The Chair has indicated his
23 interpretation of Section 118 and the effective date. Does
24 any Commissioner disagree with the Chairman's position as to
25 the effective date?

MR. KORMAN: Of course, Mr. Chairman, it may all
be academic, because the Public Broadcasters, as evidenced by

1 the record, have made a side agreement to pay from January 1,
2 1978 anyway, on the basis of these terms and conditions.

3 CHAIRMAN BRENNAN: We thank you for that reminder.

4 MR. ALIENIKOFF: Mr. Chairman, could that remark
5 be erased from the record?

6 MR. KORMAN: Absolutely not.

7 CHAIRMAN BRENNAN: Let's move on.

8 No Commissioner has indicated --

9 COMMISSIONER JAMES: I agree with you, Tom. On
10 the record; I agree with the Chairman.

11 COMMISSIONER COULTER: I accept the Chairman's
12 interpretation.

13 CHAIRMAN BRENNAN: Unless otherwise determined,
14 the effective date will be the date of publication in the
15 Federal Register.

16 The separate question which arose in this dis-
17 cussion is the desirability of publishing the rule for
18 comment before making it effective, perhaps 30 days after
19 publication. Assuming that we have that discretion under
20 Section 118, which is far from clear, is there any disposition
21 on the part of Commissioners to publish this rule for comment
22 before final adoption?

23 COMMISSIONER BURG: How long is the comment
24 period?

25 (A discussion was held off the record.)

26 COMMISSIONER JAMES: Mr. Chairman, I move that
27 the rules that have been entered into the record be adopted
28 at this time as the proposed rules of this Tribunal and that

1 they be published in the Federal Register tomorrow or as
2 soon as possible after today and that from that first date
3 of publication that any interested party be given 14 days
4 to file a comment to said proposed rules and that at the
5 conclusion of that period of time this Tribunal meet to make
6 its final determination on adoption.

7 CHAIRMAN BRENNAN: You have heard the motion which
8 I interpret, Commissioner, to be the proposed rule in whatever
9 condition it is at the end of this particular meeting, because
10 there may well be other changes at the remainder of this
11 session.

12 Do any Commissioners wish to speak on the motion
13 of Commissioner James?

14 (No verbal response.)

15 CHAIRMAN BRENNAN: If not, I believe we should
16 have a recorded vote.

17 Mr. Latman?

18 MR. LATMAN: Would you accept a comment at this
19 point?

20 The Chairman mentioned that before this motion
21 was made the legal or statutory question of whether that
22 could be done within the time frame of 118 --

23 MR. KORMAN: I didn't hear, Mr. Latman.

24 MR. LATMAN: I'm sorry. I said the Chairman had
25 questioned, I thought, threw open the question of open issue
of whether the Tribunal had jurisdiction to do that in view
of the statutory timetable. I, for one, would think respect-
fully they do not, that the provision for determination by the

1 six-month period means a determination.

2 CHAIRMAN BRENNAN: The language which you have
3 in front of you reads: "Within six months -- and I'm skipping
4 a clause -- the Tribunal shall make a determination and
5 publish in the Federal Register a schedule of rates and
6 terms which shall be binding."

7 Obviously it's not binding unless it's a final
8 rule.

9 Mr. Korman, do you wish to be heard in this
10 point?

11 MR. KORMAN: Mr. Chairman, I agree with Professor
12 Latman.

13 CHAIRMAN BRENNAN: Yes. I, as Mr. Latman indicated
14 in my initial introduction to this subject felt we had the
15 same problem with the statute, although I think Commissioner
16 James is making an excellent suggestion in terms of orderly
17 procedure and allowing comments by the parties.

18 Commissioner, do you want to comment on this?

19 COMMISSIONER JAMES: Yes. I think the problem
20 came about by virtue of the fact that the President didn't
21 make the appointments on time, as all of us know. This should
22 have been done prior to this time and I think under the
23 traditional language of certain provisions of the APA Act,
24 that generally what you have suggested, Mr. Latman, you do
25 have comments.

26 I have raised this question before early on in
27 the proceedings, early on when their were continuances asked
28 for which were going to push us back to where we are right

1 now; tomorrow.

2 But, again, I think it is the intent of this
3 Tribunal to try to be as fair to the parties as they can
4 possibly be. To permit comment pursuant to the Administrative
5 Procedure Act, I think is probably in order, and if Public
6 Broadcasting or ASCAP wants to go to the Court of Appeals,
7 they still have that right to do it.

8 CHAIRMAN BRENNAN: Any further debate on the
9 Commissioner's position?

10 Off the record.

11 (A discussion was held off the record.)

12 CHAIRMAN BRENNAN: Some Commissioners are suffering
13 the pains of hunger at this time and we will recess at the
14 call of the Chair and we will be back in ten minutes.

15 (A short recess was held.)

16 CHAIRMAN BRENNAN: The meeting will resume.

17 Commissioner James?

18 COMMISSIONER JAMES: Mr. Chairman, after subsequent
19 legal analyzation I'll withdraw my motion.

20 CHAIRMAN BRENNAN: Does any party seek recognition
21 at this time to discuss other issues in the proposed final
22 rule?

23 COMMISSIONER GARCIA: Mr. Chairman?

24 CHAIRMAN BRENNAN: Commissioner Garcia?

25 COMMISSIONER GARCIA: Off the record.

(A discussion was held off the record.)

CHAIRMAN BRENNAN: Commissioner James has
requested that there be separate vote on one section of the

1 proposed rule, Section 3, pertaining to the performance of the
2 ASCAP repertoire.

3 We will vote now on whether we shall adopt
4 Section 3 as previously amended. A yea vote is a vote to
5 adopt Section 3.

6 Commissioner?

7 COMMISSIONER JAMES: Just a minute. We are now
8 getting ready to take a vote on the entire proposal, right?

9 CHAIRMAN BRENNAN: The Chair understands that
10 Commissioner James has asked that prior to the vote on the
11 final adoption of the proposed rule, that there be a separate
12 vote on Section 3.

13 COMMISSIONER JAMES: No. I think an easier way
14 to do it, Mr. Chairman, is to vote on the total package
15 except for Section 3. Get approval on that and then put
16 Section 3 up for a vote.

17 COMMISSIONER GARCIA: We've already done that the
18 other way, Mr. Chairman.

19 CHAIRMAN BRENNAN: That would require, Commissioner,
20 a third vote to adopt the entire proposed rule.

21 I would think we're going to waste more time
22 talking about how the vote should occur. The Chair would
23 suggest that we, if you desire, have a separate vote on
24 Section 3 and then --

25 COMMISSIONER JAMES: We already voted on Section
3, hadn't we?

CHAIRMAN BRENNAN: No. We did not vote separately
on the entire section. We voted on several amendments to

1 Section 3 in the course of the meeting.

2 COMMISSIONER JAMES: I see there is going to be a
3 problem.

4 The Section 3 as it stands now, there has been a
5 vote taken on it. There has been two amendments to Section
6 3.

7 CHAIRMAN BRENNAN: At least.

8 COMMISSIONER JAMES: How do you propose to do
9 it now so that we can get the whole thing approved as to the
10 sections that we are all in agreement on and those sections
11 that we are not agreed upon?

12 CHAIRMAN BRENNAN: There is no requirement based
13 on the Administrative Procedure Act or the past practice of
14 this Agency that we have a separate vote on each section
15 of either a proposed rule or a final rule.

16 If it was not for the Commissioner's intervention
17 we would now proceed to a vote on the adoption of the final
18 rule, but the Commissioner is within his right in asking for
19 a separate vote on one or more sections of the final rule.

20 COMMISSIONER JAMES: Okay.

21 CHAIRMAN BRENNAN: I take it the Commissioner
22 requests a separate vote on Section 3?

23 COMMISSIONER JAMES: Right.

24 CHAIRMAN BRENNAN: The Chair previously defined
25 the motion, but I will repeat it. We are voting on whether
26 Section 3 as amended shall be accepted.

27 COMMISSIONER BURG: That includes both subsections
28 A and B?

1 CHAIRMAN BRENNAN: It includes all of the amendments
2 that were accepted in the course of this meeting.

3 COMMISSIONER JAMES: Mr. Chairman, so that I can
4 understand it; if I disagree with Section A and B and I agree
5 with section C and D --

6 CHAIRMAN BRENNAN: The Commissioner is entitled
7 to have a further break down to have separate votes on each
8 subsection.

9 COMMISSIONER JAMES: I so request. You can
10 lump them in twos if you like.

11 CHAIRMAN BRENNAN: There is also an "E" now,
12 because the old "C" is now "E". There is what's now an "E"
13 on the following page.

14 COMMISSIONER JAMES: What is "D" now?

15 CHAIRMAN BRENNAN: The recordkeeping; the former
16 "C".

17 COMMISSIONER JAMES: Oh, yes.

18 I just wondered if it would be easier just to
19 vote no on 304.3.

20 Put it back up. I'll just vote no for the whole
21 thing.

22 CHAIRMAN BRENNAN: Again, the vote is on whether
23 we should adopt 304.E --

24 COMMISSIONER COULTER: 304.3.

25 CHAIRMAN BRENNAN: .3, yes.

Commissioner Coulter?

COMMISSIONER COULTER: Yes.

CHAIRMAN BRENNAN: Commissioner Burg?

1 COMMISSIONER BURG: Yes.

2 CHAIRMAN BRENNAN: Commissioner James?

3 COMMISSIONER JAMES: No.

4 CHAIRMAN BRENNAN: Commissioner Garcia?

5 COMMISSIONER GARCIA: No.

6 CHAIRMAN BRENNAN: The Chair votes aye. The
ayes are three, nays are two. The section is adopted.

7 Are there any further requests for separate votes.
8 (No verbal response.)

9 CHAIRMAN BRENNAN: If not, we will proceed to the
10 vote on the final adoption of the rule.

Commissioner Coulter?

11 COMMISSIONER COULTER: Yes.

12 CHAIRMAN BRENNAN: Commissioner Burg?

13 COMMISSIONER BURG: Yes.

14 CHAIRMAN BRENNAN: Commissioner James?

15 COMMISSIONER JAMES: With the exception to the
16 previous vote, yes.

17 CHAIRMAN BRENNAN: Commissioner Garcia?

18 COMMISSIONER GARCIA: With exception to 304.3,
19 yes.

20 CHAIRMAN BRENNAN: The Chair votes yes. The
ayes are five. The nays are none. The rule has been adopted
21 and will become effective according to our interpretation
22 as of the date of publication in the Federal Register.

23 Commissioner Burg, I believe, has a request.

24 COMMISSIONER BURG: I would like to move that the
25 Chairman be authorized to make whatever technical and perfecting

1 amendments to this document, to make whatever technical and
2 perfecting amendments necessary.

3 CHAIRMAN BRENNAN: You have heard the motion of
4 the Commissioner. Is there any debate?

5 (No verbal response.)

6 CHAIRMAN BRENNAN: All those in favor, say "aye".

7 (A chorus of ayes.)

8 CHAIRMAN BRENNAN: Opposed.

9 (No verbal response.)

10 CHAIRMAN BRENNAN: The motion is adopted.

11 Mr. Korman.

12 MR. KORMAN: Mr. Chairman, I would like -- I
13 assume no other Commissioner wishes to be heard, because what
14 I say now is intended, from the standpoint of this party, to
15 be an expression of our appreciation for the dedication, the
16 very evident hard work that the Tribunal has performed and
17 the unfailing courtesy with which sometimes long-winded
18 counsel for this party and the witnesses were heard.

19 Thank you, very much.

20 CHAIRMAN BRENNAN: Thank you.

21 MR. LATMAN: Mr. Chairman, in order not to confirm
22 Mr. Korman's characterization of counsel, Public Broadcasting
23 joins in that statement.

24 CHAIRMAN BRENNAN: Thank you, very much.

25 We all thank counsel and the witnesses for their
assistance. The Chair thanks his colleagues for their
unfailing cooperation and good humor.

We have throughout this proceeding devided the

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1 the responsibilities, performing the staff work ourselves.
2 Other than for the assistance of our secretaries and the
3 transition officer, the Chairman has had the special responsi-
4 bility of being the messenger down to the Federal Register,
5 which chore I shall perform again later this week.

6 If there is nothing further to come before this
7 body, we will recess until 10:00 a.m., June 21. The meeting
8 is recessed.

9 (Whereupon, at 6:35 p.m., the meeting was
10 adjourned.)
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